

*This is a redacted version of the original decision. Select details have been removed from the decision to preserve anonymity of the student. The redactions do not affect the substance of the document.*

Pennsylvania  
Special Education Hearing Officer

DECISION

ODR No. 00176-0910KE

Child's Name: J.B.

Date of Birth: <redacted>

Dates of Hearing: 11/04/09, 11/24/09

OPEN HEARING

Parties to the Hearing:

Representative:

Parents

Parent Attorney

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School District

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Date Record Closed

January 2, 2010

Date of Decision:

January 2, 2010

Hearing Officer:

Anne L. Carroll, Esq.

## **INTRODUCTION AND PROCEDURAL HISTORY**

Student's special education eligibility and needs arise from a primary diagnosis of autism spectrum disorder complicated by unpredictable and extreme aggressive behaviors. Student's Parents believe <student> needs a private school placement where <student> can receive more individualized attention than in a District classroom. The District refused to consider an alternative placement, asserting that Student's needs can be met in the District's autistic support class, as established by Student's progress in kindergarten, where Student's behaviors were successfully managed with the instructional strategies and behavior plan in place for him.

Concluding the record in this matter was complicated by Parents' inability to identify an appropriate private school for Student that will accept <student>, an unexpected circumstance that arose just prior to convening the second hearing session. As the first hearing session ended, Parents were awaiting a decision from two private schools that they believed would be appropriate for Student, but each school ultimately determined that it could not offer <student> admission.

At the end of the second hearing session, a partial evidentiary record had been compiled, directed entirely toward determining the appropriateness of the District's program and placement. Because Parents wanted to continue exploring private placement alternatives, making it impossible to determine when the record could be completed, the parties were directed to submit closing arguments on the appropriateness of the District's program/placement offer, as there is no need for further proceedings if that issue is decided in favor of the District.

Since the District provided Student with FAPE during the 2008/2009 school year and has offered a current program and placement for Student that is reasonably calculated to permit <student> to make meaningful progress, there is no need to re-convene the hearing. Accordingly, the record will be closed and Parents' claims will be dismissed based upon the evidence as it stands.

### **ISSUES**

1. Has the District offered <student> an appropriate program and placement for the 2009/2010 school year?
2. Did the District provide <student> with an appropriate program and placement during the 2008/2009 school year, specifically from January to June 2009?
3. Did the District offer <student> an appropriate ESY program for the summer of 2009?
4. If the District did not offer <student> an appropriate program and placement at any time since January 2009, in what form and in what amount should compensatory education be awarded?

### **FINDINGS OF FACT**

1. <Student> is a 7 year old child, born <redacted>. <Student> is a resident of District and is eligible for special education services. (Stipulation, N.T. pp. 13, 14)
2. Student has a current diagnosis of autism spectrum disorder and mental retardation in accordance with Federal and State Standards. 34 C.F.R. §300.8(a)(1), (c)(1)(i), (6); 22 Pa. Code §14.102 (2)(ii); (Stipulation, N.T. p. 13)
3. Student has also been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and with intermittent explosive disorder, characterized by extremely aggressive, injury-causing behaviors toward others, particularly his Parents and other caregivers. (N.T. pp. 30, 31, 33—35, 40, 42—46, 241, 242, 257, 279; P-3, P-4, P-6)
4. Student also has pica, which causes him to put non-edible substances into his mouth. He engages in self-stimulatory and self-injurious behaviors such as biting <student's> hands when angry or frustrated. Student has limited language and self-care skills, is impulsive and has no sense of danger. <Student> needs constant supervision and cannot be left alone at any time. (N.T. pp. 29, 32, 35, 36, 41, 48, 315; P-1, P-3, P-4)

5. In August 2008, just before entering kindergarten in the District, Student experienced a sudden and extreme worsening of <student's> aggressive behaviors and regression in previously mastered skills, which Parents attribute to <student's> being molested by an aide from a home healthcare agency. Student was later diagnosed with post traumatic stress disorder. (N.T. pp. 40, 47, 63—65, 163; P-3, P-4)
6. In preparation for Student's transition from early intervention to the District for kindergarten, the District's school psychologist, who is also a board-certified behavior analyst with extensive experience in autistic support, completed an evaluation in June 2008, which summarized the findings and recommendations of a number of prior medical evaluations and the CLIU 21 preschool evaluation. The school psychologist observed Student in the early intervention classroom, had Student's Mother and speech therapist complete a behavior rating scale, and conducted a functional behavioral assessment that identified behaviors of concern, antecedents and function of the behaviors. The school psychologist's report suggested strategies to manage Student's behaviors, and suggested that a final behavior management plan should be completed after Student entered kindergarten and behaviors were observed in that setting. (N.T. pp. 51, 452—458; S-9)
7. The District developed an IEP for Student's full-day placement in a highly structured autistic support kindergarten classroom with 2—3 other children, a teacher who is a board certified behavior analyst, 2 classroom aides and an experienced 1:1 aide, with a master's degree. (N.T. pp. 321—324; S-10)
8. The kindergarten classroom was separated into physically distinct areas and the instructional day divided into 15 minute time intervals for each activity. Instructional strategies included "intensive teaching" with a variable ratio reinforcement schedule of gradually increasing the number of demands before providing a reinforcement and "errorless teaching" which begins a task with a large number of prompts faded to promote independence as the student experiences success. With respect to behaviors, the teaching staff analyzed Student's behavior on a daily basis to determine antecedents, functions and consequences in order to assure that interventions were appropriate and adjusted as necessary. (N.T. pp. 333—336)
9. Student's kindergarten IEPs included annual goals and short-term objectives in the areas of receptive and expressive language, improving social and classroom behaviors and self-help skills. The IEPs also provided for 2 hours of occupational therapy and three hours of speech/language therapy weekly, including 2 hours of individual therapy and 1 hour of group therapy. The District compiled extensive data on Student's progress toward all of his IEP objectives. (N.T. pp. 113, 207, 353—358, 367—390; S-10, S-12, S-13, S-16, S-17, S-21, S-22, S-23, S-24, S-25, S-26 )
10. Student's Parents expressed no disagreement with either the initial evaluation report, a subsequent reevaluation report or the kindergarten IEPs as revised and updated with quarterly progress reports through March 2009 at the time those documents were presented and reviewed by Student's IEP team. (N.T. pp. 58, 142; S-9, S-10, S-12, S-13, S-15, S-16)

11. In September 2008, while on a weekend trip on Student's birthday, and on Christmas Day 2008, Student attacked and injured <student's> Mother without warning and without any apparent trigger. (N.T. pp. 44, 45, 66—69)
12. In January 2009, as a result of the Christmas incident and another aggressive incident that occurred at a Christmas party, Parents requested an IEP meeting to seek more intense help for Student, fearing that ,student> would similarly attack staff and peers at school. (N.T. pp. 70—72)
13. Two short-term objectives were added to Student's receptive language IEP goal after the January meeting: selecting between 2 items that vary on one dimension for 5 pairs of adjectives and following 10 targeted 1 step verbal directions in the natural environment. An additional short term objective, a regular bathroom schedule directed toward maintaining dry pants during the school day, was added to Student's self-help goal. (N.T. pp. 343, 344; S-10, S-12)
14. The District was not seeing a deterioration in Student's behaviors at school and reported progress on <student's> original IEP goals and objectives through the second marking period. A CLIU 21 behavior specialist who worked with the family from December 2008 through June 2009 and had frequent contact with Student's teacher and aide did not observe, and was not informed of, the same kinds of aggressive behaviors at school that Student exhibited at home and toward her in community settings. (N.T. pp. 71, 72, 257, 259, 372—375, 378—390; S-12, S-13, S-26)
15. Subsequently, IEP meetings for Student were held in February, March and April 2009 at Parents' request. Parents first sought placement in a partial hospitalization program, which the District agreed to explore. After determining that there was no appropriate partial hospitalization program for Student within a reasonable travel distance, Parents requested that the District place Student at a private school, [Redacted Center]. (N.T. pp. 72—76, 345, 346, 353, 405, 503; S-13, S-16, S-17)
16. After the District reevaluated Student in March 2009, including an updated FBA, it concluded that no change of placement from the District kindergarten program was appropriate or necessary at that time. The District noted Student's continued progress on his IEP goals and objectives, including mastery of some objectives, and the ability to manage aggressive behaviors at school, where Student was observed to be compliant with both instructional activities/tasks and transitions, increased his successful participation in activities throughout the school building and increased his use of speech for requests. Parents' input noted Student's independent use of more request words at home, as well as looking at his Parents more during conversations. (N.T. pp. 77—82, 138, 348—350, 391, 392, 460—468; S-12, S-13, S-15, pp. 5, 9, 12, 13, S-16, S-26)
17. The reevaluation report noted that Student is capable of inflicting significant injury and that there had been instances of aggressive behaviors in school, as well as at home. The school psychologist recommended continued close supervision of Student and

18. The SETT process<sup>1</sup> for determining appropriate assistive technology devices for Student began with a first meeting in October 2008, followed by meetings in February and April 2009. During the 2008/2009 school year, several devices to facilitate communication and participation in school activities were tried and others were identified for future trials. Student liked and used a Crayola Keys keyboard, but did not like using the Vantage vocal output communication device. Other devices that perform the same function were identified for future trials but were not available from PaTTAN before the end of the school year. (N.T. pp. 200—202, 446—450; S-10, S-20)
19. After first agreeing to the Extended School Year (ESY) program offered by the District, Parents ultimately rejected the ESY program by not sending Student to the District program, which was to take place in a different school building but continue to work on Student's IEP goals and provide occupational and speech/language therapy. (N.T. pp. 84—86, 145, 347, 435; S-14)
20. The District prepared for Student's 1<sup>st</sup> grade year (2009/2010) by having the 1st grade teacher observe Student in the kindergarten class. The kindergarten teacher also met with the 1<sup>st</sup> grade teacher to give him all of Student's programming and materials. When Student returned to school, the kindergarten teacher, who had become the District's behavior consultant, stayed with him during his entire first day and observed no aggressive behaviors. The school psychologist also observed Student interacting appropriately with adults and peers on the days he attended school during the 2009/2010 school year. (N.T. pp. 393, 394, 468, 469)
21. The 1<sup>st</sup> grade class Student attended at [Redacted] Elementary School consisted of 5 students, including Student. There were again 4 adults in the classroom, including his 1:1 aide. The 1<sup>st</sup> grade autistic support classroom is also a structured program with antecedent interventions in place to promote success and meet Student's behavior needs. Both the kindergarten and 1<sup>st</sup> grade class provided a structured setting, emotional support/guidance and a low student-teacher ratio. (N.T. pp. 393, 395—397)
22. Parents have permitted Student to attend school in the District only briefly since the end of kindergarten (2008/2009 school year). When he entered 1<sup>st</sup> grade several weeks after the 2009/2010 school year began, he exhibited extremely aggressive and uncontrollable behaviors after school in community settings and at home, as well as increased sleep disturbances. (N.T. pp. 85—91, 146; P-12)
23. After 4 days of school attendance in the District 1<sup>st</sup> grade autistic support class, followed by a weekend of uncontrollable behavior that culminated in a trip to a hospital emergency room, Student was examined by a psychiatrist and referred to the KidsPeace in-patient

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<sup>1</sup> The acronym refers to determining the types of assistive technology devices likely to be beneficial to a student with special needs by analyzing Student needs, the relevant Environment in which the student needs assistance, the Tasks for which assistance is needed and the appropriate Tools to accomplish the tasks.

hospital program for a brief time, after which he received a medical prescription for homebound instruction. (N.T. pp. 89—97, 112, 277—279; P-15)

## **DISCUSSION AND CONCLUSIONS OF LAW**

### A. Legal Standards

#### 1. Parameters of a Free, Appropriate Public Education (FAPE)

The standards governing the obligation to provide for the educational needs of eligible children were recently summarized by the Court of Appeals for the 3<sup>rd</sup> Circuit as follows:

The Individuals with Disabilities Education Act (“IDEA”) requires that a state receiving federal education funding provide a “free appropriate public education” (“FAPE”) to disabled children. 20 U.S.C. § 1412(a)(1). School districts provide a FAPE by designing and administering a program of individualized instruction that is set forth in an Individualized Education Plan (“IEP”). 20 U.S.C. § 1414(d). The IEP “must be ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s ‘intellectual potential.’ ” *Shore Reg’l High Sch. Bd. of Ed. v. P.S.*, 381 F.3d 194, 198 (3d Cir.2004) (quoting *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182-85 (3d Cir.1988)).

*Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3<sup>rd</sup> Cir. 2009).

“Meaningful benefit” means that an eligible child’s program affords him or her the opportunity for “significant learning.” *Ridgewood Board of Education v. N.E.*, 172 F.3d 238 (3<sup>RD</sup> Cir. 1999).

In order to properly provide FAPE, the child’s IEP must specify educational instruction designed to meet his/her unique needs and must be accompanied by such services as are necessary to permit the child to benefit from the instruction. *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982); *Oberti v. Board of Education*, 995 F.2d 1204 (3<sup>rd</sup> Cir. 1993). An eligible student is denied FAPE if his program is not likely to produce progress, or if the program affords the child only a “trivial” or “*de minimis*” educational benefit. *M.C. v. Central Regional School District*, 81 F.3d 389, 396 (3<sup>rd</sup> Cir. 1996; *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3<sup>rd</sup> Cir. 1988).

Under the interpretation of the IDEA statute established by the U.S. Supreme Court in *Rowley* and other relevant cases, a school district is not, however, required to provide an eligible student with services designed to provide the “absolute best” education or to maximize the child’s potential. *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 251; *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3<sup>rd</sup> Cir. 1995).

## 2. Due Process Hearing/Burden of Proof

The IDEA statute and regulations provide procedural safeguards to parents and school districts, including the opportunity to present a complaint and request a due process hearing in the event special education disputes between parents and school districts cannot be resolved by other means. 20 U.S.C. §1415 (b)(6), (f); 34 C.F.R. §§300.507, 300.511; *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 240.

In *Schaffer v. Weast*, 546 U.S. 49; 126 S. Ct. 528; 163 L. Ed. 2d 387 (2005), the Supreme Court established the principle that in IDEA due process hearings, as in other civil cases, the party seeking relief bears the burden of persuasion. Consequently, in this case, because Parents have challenged the appropriateness of the Student’s program and placement, Parents must establish that the District’s IEPs during the second half of the 2008/2009 school year, the ESY program offered for last summer, and the District’s proposed program/placement for the 2009/2010 school year were and are not reasonably calculated to assure that Student would receive meaningful educational benefit from the proffered services.

Since the Court limited its holding in *Schaffer* to allocating the burden of persuasion, explicitly not specifying which party should bear the burden of production or going forward with the evidence at various points in the proceeding, the burden of proof analysis affects the outcome of a due process hearing only in that rare situation where the evidence is in “equipoise,”



*i.e.*, completely in balance, with neither party having produced sufficient evidence to establish its position with certainty.

#### B. Parameters of the Dispute/Outcome

This case involves a child and family who have had to deal with a number of difficult and serious conditions that adversely affect every area of the child's development—cognitive, behavior, language, self-care and social relations--resulting in complex needs requiring intensive interventions in all aspects of his life, beginning in early childhood. The already difficult circumstances were worsened in August 2008, just before Student's 6<sup>th</sup> birthday, when it appears that he was molested by a home health aide. Following a day in which Student's GPS locating device placed him in an apartment for most of the time spent with the aide, rather than in the community settings where the aide was supposed to have taken him, there was a sudden and dramatic increase in Student's aggressive, injurious behaviors directed toward himself and others, particularly at home. (*See* N.T. p. 47; P-3, p. 4, P-4, p. 1) Student's Father testified that after August 28, 2008, "My son hasn't been the same." (N.T. p. 165, l. 18, 19)

Student began kindergarten just a few days later, but Parents do not claim that the program and placement developed by the IEP team and offered by means of a NOREP dated August 20, 2008 was inappropriate from the beginning of the 2008/2009 school year. As the parties had planned, Student was placed in a full day, highly structured autistic support class of 3-4 students, including himself, that was staffed by 4 adults, including an experienced, Master's level 1:1 aide to accompany him at all times. (F.F. 7, 8) Student received explicit, intensive, research-based instruction from a highly trained and experienced teacher/certified behavior analyst in all areas in which he exhibited significant needs: receptive and expressive language, classroom and social behavior, and self-help/self-care skills. (F.F. 8, 9) A functional behavioral

assessment had been conducted as part of the District's initial evaluation, and a behavior plan was instituted and reviewed/updated on a regular basis. (F.F. 6, 8) Finally, Student received a combined 5 hours/week of occupational and speech/language therapy. The services provided in Student's original kindergarten IEP continued throughout the entire school year, and the record is completely devoid of any evidence that the interventions implemented by the District during Student's kindergarten year were ineffective or unsuccessful in the school environment. To the contrary, all of the extensive documentary evidence produced by the District and the testimony of witnesses who actually observed Student in his kindergarten class were consistent in reporting the steady, and sometimes remarkable, progress Student made throughout his kindergarten year in all areas encompassed by his IEP goals and objectives, albeit with some aggressive and inappropriate behaviors occurring during school. *See* F.F. 9, F.F. 16; testimony of Student's kindergarten teacher, pp. 367—390 and exhibits S-12, S-13, S-16, S-17, S-21-- S-26. *See also* S-24, Behavioral Data from September 2008—June 2009.

Student's Parents did not question, or express disagreement or dissatisfaction with the School District's program or Student's progress until January 2009, following a disturbing incident on Christmas Day when Student unexpectedly became physically aggressive toward his Mother. (F.F. 11) As Student's Mother testified, "We realized at that point more than ever that <student> needed intense help." (N.T. p. 70, l. 13, 14) Parent was referring, however, to help for Student's behaviors at home, since there is no evidence that the same type of intense, unprovoked and sustained aggression had ever occurred in the school setting. *See* S-24, P-18, Parents' Behavior Summary compiled from School District behavior data

Since Parents' expressed concern about Student's progress was clearly focused on the aggressive behaviors he exhibited at home, and since both Parents testified that neither of them

had ever observed Student in school, Student's Mother's testimony that <student> made no progress at all in <student's> kindergarten program, particularly during the 3<sup>rd</sup> and 4<sup>th</sup> quarters of the 2008/2009 school year, is entitled to no weight. (N.T. pp. 117, 126—129, 199) It is obvious that Mother's only basis for denying Student's progress was that she did not consider <student> to have mastered any objectives if the developing skills reported by the school were not observed at home and in community settings. See N.T. p. 126, l. 12—20:

...I know what my <student> is capable of doing. And when someone said that <student's> mastered something and it's not being generalized in the community, nor at home, and I've never seen <student> doing any of the things or speaking or receptively—any of the things that are said here, then I have to say that, no, those goals were not met. If they had been, indeed, met, then <student> would be able to do them over different environments.

Moreover, Mother's testimony concerning Student's alleged lack of progress elicited on cross-examination at the due process hearing was contradicted by parent input into the reevaluation report issued in March 2009 (F.F. 16; S-15, p. 5)

The factual circumstances presented by this case, as well as Parents' underlying contention that the District is, in effect, obligated to assure generalization of skills to home and community settings, are remarkably similar to the California district court decision in *San Rafael Elementary School District v. California Special Education Hearing Office*, 482 F.Supp.2d 1152 (N.D. Cal. 2007). In that case, as here, the student's behaviors were fairly well-controlled in the school setting, although not perfectly. The student's behaviors in school had, in fact, deteriorated just before the controversy arose, but the student's increasingly aggressive, uncontrollable out of school behaviors were at the heart of the parties' dispute. Parents contended, and a hearing officer agreed, that the student's educational needs, and the district's FAPE obligation, extended to assuring that behavioral skills learned and exhibited in the school setting were generalized to home and community settings.

The district court, however, disagreed and reversed the hearing officer's decision that the district was obligated to pay for a private residential placement that appeared reasonably calculated to address that need, holding that, "[T]he District is not required to ensure that a student takes behavioral skills learned at school into the home. The District is only required to ensure that a student's IEP is 'reasonably calculated to provide educational benefits.'" 482 F.Supp2d at 1164 (Citation omitted).

The legal conclusion that the District's obligation extends only to assuring progress on IEP behavior goals is also based on the sound, common sense consideration that behaviors vary according to setting. Coping skills, therefore, must be tailored to the environment in which they are to be used. As Student's kindergarten teacher testified,

The behavior plan as part of our IEP is to address behavior problems in school. If there were behaviors occurring in the home, it's not something we can really address with the school behavior plan. ...As a classroom teacher what I can address are the observable behaviors that I have in the classroom.

N.T. p. 418, l.12—16, 20—22. Since an effective behavior plan depends upon identifying the antecedents, function and consequences of behaviors, all of which are highly likely to vary according to setting, it is simply unrealistic to expect behavior skills developed and practiced in a school setting to automatically generalize to the home environment for a student as severely affected as Student, and particularly when the behaviors of concern at home apparently arose in response to a traumatic event.

According to Parents' testimony and the testimony of other caregivers, Student's aggressive behaviors at home continued throughout the 2008/2009 school year. *See, e.g.*, N.T. pp. 29—35, 241, 242; With no improvements in behavior at home resulting from Student's educational program, Parents became convinced that a private school program would provide Student with both greater academic progress and improvement in <student's> out of school

behaviors. *See* N.T. pp. 98—105, where Mother noted differences between the District setting and two private schools that she believed would better meet Student’s needs.

In addition to an untenable legal and practical basis for Parents’ position that Student’s progress in the District program and placement must be assessed in terms of how well <student’s> behavior and other skills have been generalized to other environments, Parents presented no evidence to support their position that an out of District private placement would assure the improvement they want to see in Student at home and in community settings. Parents’ apparent conviction that simply removing Student from a public to a private school would result in improved behaviors at home is purely speculative, based upon the unsupported hope that such a change would provide a solution to the intractable problem they face in reducing Student’s unpredictably aggressive out of school behaviors.

In the first instance, Parents have not, and cannot, establish that the District has so thoroughly failed to provide an appropriate program and placement for Student, that only a private placement can meet <student’s> needs based upon the opinions of psychiatrists and other medical providers who have no direct knowledge of what the District has provided and can provide for Student. The psychiatrist who testified on behalf of Parents and recommended a private school placement for Student based his opinion upon never having “seen schools that demonstrate that ability to work that well with someone who is as challenging as Student.” (N.T. p. 285, l. 21—23) The psychiatrist, however, never visited the District’s autistic support class, spoke to anyone from the District, or thoroughly reviewed Student’s progress reports. (N.T. pp. 289—291, 294) Consequently, the psychiatrist was not aware that Student has a highly trained 1:1 aide, or that there were two certified behavior analysts involved in programming for <student>. (N.T. p. 290) The psychiatrist admitted that his role was “to be an advocate for my

clients and what I feel that he needs optimally.” (N.T. p. 290, l. 14, 15) No expert opinion on the desirability of an optimal program and placement, can, of course, outweigh the applicable legal standard that provides for an appropriate, not an optimal program.

Moreover, whether he realized it or not, the District’s program encompasses the components of the type of program and placement described by the psychiatrist in both his testimony and his report : a placement “sensitive to [Student’s] underlying autism [that can] really provide for his emotional, social and academic needs within the classroom” (N.T. p. 280, l. 16—18); “a one-on—one situation most of the time” (N.T. p. 286, l. 10, 11); “a structured setting providing emotional support and guidance and offer a low student-teacher ratio.” (P-15, pp. 3, 4) *See* F.F. 6, 7, 8, 9

Finally, neither the psychiatrist who testified at the hearing or any of the physicians whose reports Parents entered as exhibits identified a particular setting or characteristics of a program that differs significantly from the District’s program, that would provide greater educational benefit to Student, much less describe how an “ideal program” would assure generalization of skills from school to home or otherwise improve Student’s behavior at home. Most tellingly, the psychiatrist who testified at the due process hearing noted that,

I mean, I think what does need to be recognized is that when you’re dealing with children who have pervasive developmental disorders it’s not—it’s not unexpected that there might be years where someone functions in a certain way. So that I will have cases where kids thrive in school...and will do very well and then as soon as they get home and their buttons are pushed by brothers, sister, other environments or knowing that—you know, and again, oftentimes, you know, even in the best of families, you know, because Parents are so emotionally involved with their kids, you know, these kids are very good at picking up on what they can manipulate in the situation. **So they know in school that they can’t manipulate as well so they might function somewhat better in school. But when they go home they know that dad capitulates, mom capitulates, so that this can cause them to have more of their meltdowns in the home situation.**

N.T. pp. 286, l. 17—25, 287, l. 1—13 (Emphasis added). That testimony was certainly not intended to assign blame to Parents for home behaviors, and it is not cited for that purpose, but it does provide another basis for rejecting the notion that assessing meaningful progress in a school program should take into account whether appropriate behaviors and other indicia of progress are observed at home. Although there may be situations where generalization of skills could be relevant to some degree in assessing whether progress is meaningful, that is certainly not the case here, where there is no evidence that anything occurred in school that triggered aggressive behaviors at home. Indeed, here the evidence is entirely to the contrary—the dramatic increase in aggressive behaviors at home can be pinpointed to an incident that predated and had absolutely nothing to do with school attendance. (F.F. 5) Moreover, the most serious incidents of aggressive behavior reported by Parents occurred on a weekend and during a school vacation. (F.F. 11)

Although Student’s recent in-patient hospitalization occurred after <student>e attended school for four days near the beginning of the current school year, Parents provided no evidence of a cause/effect relationship between attending the District program and the behaviors that ultimately resulted in the KidsPeace in-patient admission. (F.F. 23) The psychiatrist who recommended the hospitalization referred only to the Parents’ lack of control over Student’s behaviors as the reason for the recommendation. *See* N.T. pp 276—278. Consequently, the proximity of the hospitalization to attending school provides no basis for determining that the 1<sup>st</sup> grade autistic support program proposed by the District for the current school year is inappropriate. There is also no basis for concluding that attendance at a private school program would have prevented the breakdown that precipitated the hospital stay or, for all of the reasons

explained above, that ordering the District to fund a private school placement would either improve Student's behaviors at home or prevent a similar crisis in the future.

It is certainly understandable that Parents want the best possible program and placement for their <child>, perhaps with a treatment component specifically designed to abate <student's> still uncontrolled out of school behaviors, as well as an educational program. Parents, however, are entitled only to an "appropriate" program, *i.e.*, one reasonably calculated to provide Student with meaningful progress and the opportunity for significant learning. As noted above, the District is not required to guarantee that progress in school is generalized to home and community settings.

Moreover, the District is not required to assure that Student receives medical or mental health treatment beyond that necessary to assure the Student can effectively benefit from the instruction he is provided. *See Mary Courtney T. v. School District of Philadelphia*, 575 F.3d at 246, holding that where medical and educational needs are severable, school districts are required to provide only for educational needs. Here, the evidence amply established that Student' educational needs, including controlling classroom behaviors, were appropriately met by the School District's autistic support kindergarten classroom during the 2008/2009 school year, and there is no evidence suggesting that continuing with a small, structured autistic support classroom would not also result in meaningful educational progress during the current school year.

There is, therefore, no basis for either awarding compensatory education for the 2008/2009 school year, or for concluding that the program/placement for the current school year does not remain appropriate for Student. There is no dispute concerning the severity of Student's needs, but the legal standards applicable to this matter simply do not make the District



responsible for assuring that all such needs are met outside of the school environment. Parents' testimony and arguments suggesting that the District's program is inadequate and inappropriate due to a lack of academic goals, flawed communication goals, or for not providing Student with an augmentative communication device are simply grasping at straws. *See*, N.T. pp. 102, 103; Closing Argument of Parents, pp. 8, 9. The SETT process to identify appropriate assistive technology for the Student began early in the 2008/2009 school year and was interrupted only because Student has not been in school since June 2009. (F.F. 18) There is no evidence that the SETT process did not proceed appropriately. There is also no evidence that Student's language goals were not entirely appropriate for him, or that either language or academic skills could have advanced faster with a different program. To the contrary, all of the reports Parents submitted suggest that when Student began kindergarten, both <student's> receptive and expressive language skills were significantly delayed and that <student's> intellectual capacity falls into the mentally retarded range. *See, e.g.*, P-1, P-2, P-3. Moreover, prior to their due process complaint, Parents never suggested that there were any deficiencies in the District's program other than Student's continuing aggressive behaviors at home and in the community.

### **CONCLUSION**

Because the evidence in this case establishes that the District provided Student with an appropriate program and placement for the entire 2008/2009 school year, including offering an appropriate ESY program, notwithstanding Parents' decision not to allow Student to participate, and because there is no evidence that the similar autistic support program and placement offered for the current school year is inappropriate and would not have resulted in meaningful educational progress during this school year if Student had been permitted to attend the assigned program, there is no basis for an award of compensatory education for any period in dispute.

Because the District has made FAPE available to the Student for the 2009/2010 school year, the District is not required to fund a private school placement for the Student. 20 U.S.C. §1412(a)(10)(C)(i); 34 C.F.R. §300.148(a). Accordingly, there is no need to hold the record open until Parents identify a private school program in order to consider whether such private placement would be appropriate for the Student as required by the second step of the three part analysis identified by the U.S. Supreme Court in *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985) and *Florence County School District v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed. 2d 284 (1993). The record, therefore, will be closed, with this decision constituting final disposition of this case.

### **ORDER**

In accordance with the foregoing findings of fact and conclusions of law, it is hereby

**ORDERED** that:

1. The due process hearing record compiled in this case to date, consisting of two days of testimony, the exhibits admitted into the record on November 24, 2009, the written closing arguments of counsel with respect to whether the District provided and offered <student> FAPE from January 2009 through the present, and this decision, constitutes the entire record needed for final disposition of this matter and the record, therefore, is now **CLOSED**.
2. Based upon the evidentiary record described above and the legal standards applicable to this matter, the District has provided and offered <student> a free, appropriate public education from the time of Student's enrollment in the District for kindergarten at the beginning of the 2008/2009 school year through the present.
3. Parents' request for a private school placement at public expense and Parents' claims for compensatory education are **DENIED** and this case is **DISMISSED**.

Anne L. Carroll

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Anne L. Carroll, Esq.  
HEARING OFFICER

January 2, 2010